Manno Electric, Inc. and Jack Manno Sr. *and* International Brotherhood of Electrical Workers, Local Union 995, AFL–CIO. Cases 15–CA–11891, 15–CA–11891–2, 15–CA–11922, 15–CA–11951–1, 15–CA–11952–2, 15–CA–11997–1, 15–CA–11997–2, 15–CA–12170, and 15–CA–12245

May 22, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

This case involves alleged violations of Section 8(a)(1), (3), and (4) of the Act by the Respondents during a union organizing campaign.[1] The Board has considered the judge's decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings,[3] findings,[4] and conclusions,[5] except as discussed below, and to adopt his recommended Order as modified and set forth in full below.[6]

1. The Respondents have filed a motion for a new trial, alleging that discrimination within the meaning of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. § 791, et seq., resulted in a prejudicial denial of due process. Specifically, the Respondents contend that the judge failed to provide, or offer to provide, special auditory enhancement devices to Jack Manno Sr., president of Manno Electric. Without such a device, Manno allegedly could not understand witness testimony and could not provide necessary assistance to counsel.

We find no merit in the Respondents' argument. Although the Respondents' counsel informed the judge that Jack Manno had a hearing problem, he made no request for special auditory enhancement equipment before or during the hearing, which entailed 9 days of testimony in a 38-day period. Jack Manno wore a hearing aid on each ear throughout the proceeding. On several occasions, the judge instructed witnesses to speak more loudly. There is no evidence of contemporaneous complaints that such instructions did not reasonably accommodate Jack Manno's hearing problems. The Respondents did not even mention Jack Manno's alleged inability to assist counsel in their posthearing brief to the judge. They also did not file any timely formal claim of discrimination on the basis of Jack Manno's disability.[7] Based on the foregoing, we find that the Respondents have failed to prove prejudicial denial of due process during the hearing. We therefore deny the motion for new trial.

2. The General Counsel excepts to the judge's failure to find that Respondent Manno Electric[8] violated Section 8(a)(3) and (1) of the Act by assigning union members Bonnette and Clary to certain jobsites and by subsequently discharging them. For the reasons discussed below, we find merit in these exceptions.

In July 1992,[9] the Respondent hired five individuals, including Bonnette and Clary, who were members of the Union.[10] It assigned them to several different

[1] On July 20, 1994, Administrative Law Judge Lowell M. Goerlich issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the Respondents filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] We find no merit in the Respondents' procedural objections to the General Counsel's cross-exceptions and brief.

[3] We find no merit in Respondent Jack Manno's exception to the judge's denial of his motion to dismiss him individually from the complaint in Case 15–CA–12170, which involves the unlawful maintenance of portions of a state court lawsuit. We agree with the judge that it is appropriate to include Manno as an individual respondent in that case in order to avoid frustrating the remedial purposes of the Act. In this context, it is not necessary to determine whether Jack Manno is an alter ego of Respondent Manno Electric, Inc.

Member Cohen concludes that Respondent Jack Manno acted jointly with Respondent Manno Electric in filing and maintaining the lawsuit. Accordingly, each is responsible for the acts of the other, and each can be subjected to a remedial order.

[4] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[5] Member Cohen agrees with his colleagues that pars. 2 and 6 of the Respondents' lawsuit are preempted by the NLRA. These paragraphs relate to the protected activity of employee access to Board processes. Concededly, the paragraphs allege that the use of Board processes was malicious, and it may well be that a malicious use of Board processes is not protected. However, there is no evidence to support the allegation of malice. Accordingly, Member Cohen agrees that these paragraphs are preempted.

Similarly, pars. 5 and 7 of the complaint relate to arguably protected activity, and there is no evidence of malice. Accordingly, Member Cohen agrees that these paragraphs are preempted within the meaning of fn. 5 of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

In view of the above, Member Cohen does not pass on whether these paragraphs have an ''unlawful objective'' within the meaning of fn. 5.

[6] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[7] See § 100.670 of the Board's Rules and Regulations. We emphasize that we are deciding a due-process claim with respect to the conduct of the unfair labor practice hearing, not a handicap discrimination claim under § § 100.601–100.670 of the Board's Rules, which implement the protective statutes upon which the Respondents rely in their motion. We note, however, that neither the Rules nor the enabling legislation specifically require the Agency to make an unsolicited offer of the kind of special hearing enhancement device described by the Respondents in order to accommodate a general claim of impaired hearing.

[8] In this section of our decision, any singular reference to ''Respondent'' means Respondent Manno Electric.

[9] Unless otherwise indicated, all dates are 1992.

[10] In the Respondents' answering brief to the General Counsel's cross-exceptions, they argue for the first time that these union mem-

jobsites in the Baton Rouge area. An August 6 letter from the Union to the Respondent identified the five employees as the Union's organizing committee. At that time, only Bonnette worked exclusively at the Respondent's Contempo Casuals jobsite. He was the leadman there.

As fully described in the judge's decision, the Respondent's officials reacted to the commencement of organizing activities on August 6 by committing several violations of Section 8(a)(1) of the Act in the next few days. These unfair labor practices included overbroad restrictions on solicitation activities and on talking with employee union organizers. Employees were expressly warned that failure to abide by these restrictions would result in discharge. By August 14, the Respondent had assigned four of the five union committee members to work exclusively at the Contempo Casuals jobsite, where work was near completion. Then, between August 15 and 17, the Respondent discriminatorily laid off all five employees. In discussing these layoffs with Bonnette and Clary, President Jack Manno unlawfully cautioned that their future employment would be conditioned on his receipt of written assurance that they would not engage in organizing activities during the day.

In late September, the Respondent recalled discriminatees Bonnette, Clary, and Grayson. In the period between the layoffs and the recalls, it had hired four new mechanics. It unlawfully refused to hire any applicants who were known union members. On September 29, Jack Manno assigned mechanic Clary and apprentice Grayson to join leadman Ernie Harper and helper Malcolm Cassels at the Louisiana Express jobsite, which was not far from Baton Rouge. Manno assigned Bonnette to work at the Baldwin Motors jobsite in Covington, Louisiana. This jobsite was approximately 60 miles from Baton Rouge. At the same time, the Respondent reassigned mechanic Danny LaLonde to its Circuit City job in the Baton Rouge area.

Bonnette testified that, upon reporting to Covington, he found little to do in a job which was near completion. He said that leadman Dwight Lane told him ''I really don't even know why they sent you here . . . I barely got enough work to keep these guys busy.'' Bonnette asked Lane to have Jack Manno call him that evening about whether Bonnette could ride to and from Baton Rouge with Lane in the company truck.

Lane admitted that he had provided rides to other Manno employees who lived in the Baton Rouge area and had worked at the Covington jobsite. He also admitted relaying Bonnette's request to Jack Manno. Lane testified that there was sufficient ''punchlis'' work for a mechanic in finishing the Baldwin Motors job. Local area employee Larry Flot also testified that there was ''plenty to do.''

Manno did not call Bonnette on September 29. The next day, Bonnette again believed that he had little work to do. He repeated his request for Lane to have Manno call him, adding ''This sending me to a job that's finished and letting me not ride with you . . . I think they're screwing with me . . . just because I'm a union guy.'' Lane delivered the message, but Manno still did not call Bonnette.

In the morning of October 1, Bonnette went to the Respondent's Baton Rouge office instead of the Covington jobsite. Bonnette told General Superintendent Ebey that he was being sent to a job where there was nothing to do and he complained about not getting to ride in the van. Ebey replied that there was work to do. Bonnette answered that he was going on an ''unfair labor practice strike.''

Bonnette tried to reach President Jack Manno by phone later that morning. He spoke instead to General Manager Jay Manno, Jack Manno's son. Jay Manno asked why Bonnette had not reported to the Covington job. Bonnette explained that he had come to the shop to speak with Ebey and that he told Ebey he was going on an unfair labor practice strike. Jay Manno told Bonnette that he was fired because he ''didn't report to work and went on strike.'' Bonnette's separation notice stated that Bonnette had ''failed to report to work at the prescribed time.''

The Respondent had approximately 30 mechanics working at various jobsites in the Baton Rouge area. It hired a new mechanic and assigned him to work at a Baton Rouge jobsite on October 1. After Bonnette failed to report to Covington on that day, Manno chose to call leadman Harper at the Louisiana Express jobsite about a replacement for Bonnette, who was a journeyman mechanic. Union member Clary was the only mechanic at the Louisiana Express jobsite, and union member Grayson was the only apprentice working there. The Respondent's officials knew that Bonnette and Grayson had engaged in informational picketing during nonworking time since their recall.

Manno picked Clary for reassignment to the Covington job, allegedly because Leadman Harper was dissatisfied with Clary's work.[11] Clary did not have his own

bers were not employees within the meaning of Sec. 2(3) of the Act because they sought employment with a nonunion employer pursuant to the Union's ''salting'' policy. The Respondents rely on the opinion of the Eighth Circuit in *Town & Country Electric v. NLRB*, 34 F.3d 625 (1994). In the absence of timely filed exceptions, the Respondents have not timely raised the employee status issue before us. Furthermore, we note that the Supreme Court reversed the circuit court's opinion and held, in accordance with Board law, that union organizers who applied for jobs with nonunion companies qualified as ''employees'' within the meaning of Sec. 2(3) of the Act. *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995).

[11] While discussing the layoffs on August 17, Jack Manno had acknowledged that Bonnette and Clary were ''very good workers.''

transportation, but Jack Manno gave him permission to ride with Lane in the company van. Clary only worked at the Covington jobsite on October 2. Upon his return to the Respondent's office in Baton Rouge, Manno told Clary that the only available work was in Metairie, a northern suburb of New Orleans, approximately 80 miles from Baton Rouge. Manno testified that leadman Lane had complained about Clary's work at Covington.

Clary told Manno that he lacked transportation, but that he would go to New Orleans if the Respondent could provide the transportation. Manno told Clary that ''he couldn't do that.'' He also refused Clary's request to be assigned to a closer jobsite. Clary then asked to be laid off. Instead, Clary received a notice that he was a ''voluntary quit'' because he had ''refused suitable work.''

The Respondent employs a separate work force in the New Orleans area. Jack Manno admitted that the Respondent's standard policy was not to require employees from the Baton Rouge area to commute to New Orleans. In his words, ''they hardly ever work New Orleans out of Baton Rouge.'' He further admitted that the Respondent would routinely send only one person from Baton Rouge to jobs in smaller, distant towns like Covington and would attempt to hire the remainder of its work force locally. Other than leadman Dwight Lane, Bonnette and Clary were the only Baton Rouge area employees assigned to work at the Baldwin Motors jobsite in Covington from Tuesday, September 29 through Friday, October 2. The Respondent did not assign anyone to replace Clary after the latter date. On Monday, October 5, Clary's reporting date for the New Orleans assignment, the Respondent hired an apprentice and assigned him to work at a Baton Rouge jobsite.

The judge summarily concluded that the General Counsel did not establish a prima facie case in support of allegations that the serial assignment of Bonnette and Clary to the Covington jobsite and the attempted assignment of Clary to the New Orleans area jobsite violated Section 8(a)(3). We disagree.[12]

The Respondent's antecedent unfair labor practices, most notably including its unlawful layoff of Bonnette, Clary, and three other known union organizers, clearly establish its animus towards the Union generally and towards Bonnette and Clary specifically. Furthermore, prior to the layoffs, the Respondent tried to minimize contacts between known union members and other employees working at various jobsites in the Baton Rouge area. It unlawfully restricted solicitations by and conversations with prounion employees. In addition, during the week prior to the unlawful layoff, it clustered all but one of the five known union activists at a single, nearly finished jobsite. This assignment pattern, although not alleged to be unlawful, is relevant to our examination of the Respondent's motivation for assignments made to Bonnette and Clary after their recall.

When, in an admitted attempt to induce withdrawal of unfair labor practice charges,[13] the Respondent did recall Bonnette, Clary, and Grayson in late September, Jack Manno assigned the latter two to a single, small Baton Rouge jobsite. He assigned Bonnette to the nearly complete Covington job, where nonlead employees from the Baton Rouge area did not regularly work and where no such employees currently worked. Manno made this assignment in spite of the undisputed availability of mechanic's work at Baton Rouge area jobsites. Furthermore, he ignored Bonnette's inquiries, transmitted by leadman Lane, about permitting Bonnette to ride to and from work with Lane in the company van, even though other Baton Rouge area employees temporarily assigned to the Covington job (including Clary) enjoyed this privilege.

After Bonnette's termination, Jack Manno chose to select a replacement from the one jobsite where known union activists were working. In fact, Clary was the only journeyman electrical mechanic (Bonnette's job classification) at that site. Upon his recall to work there, he had picketed in contravention of Jack Manno's unlawful admonition about foregoing organizing activities as a condition of further employment. Finally, after Clary had worked only 1 day at Covington, Jack Manno attempted to assign him to a job in the New Orleans suburbs, where Baton Rouge-based employees ''hardly ever'' worked, even though work was available on the same day in Baton Rouge for a newly hired apprentice.

We find that with the evidence summarized above the General Counsel has carried his burden of proving that the employees' protected union activity was a sub-

[12] The Board has traditionally described the General Counsel's burden of demonstrating discriminatory motivation as one of establishing a prima facie case. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The D.C. Circuit has suggested that in light of *Office of Workers' Compensation Programs v. Greenwich Collieries*, 114 S.Ct. 2551, 2557–2558 (1994) (the General Counsel's burden of proof is a burden of persuasion, not merely of production), ''it will no longer be appropriate to term the General Counsel's burden that of mounting a prima facie case; his burden is to persuade the Board that the employer acted out of antiunion animus.'' *Southwest Merchandising Corp. v. NLRB*, No. 93-1859, slip op. 9 fn. 9 (May 12, 1995). This change in phraseology does not represent a substantive change in the *Wright Line* test. Under that test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers' Compensation Programs v. Greenwich Collieries*, supra at 2258.

[13] In light of the postlayoff hiring of mechanics, we reject the Respondent's claim that it recalled the three discriminatees ''when work became available.''

stantial or motivating factor in the challenged job assignments. In sum, the evidence demonstrates the Respondent continued its prelayoff practice of isolating known union organizers from targeted Manno employees in the Baton Rouge area.[14] This time, the Respondent simply assigned Bonnette, then Clary, to jobsites where no Baton Rouge area employees worked (other than leadman Lane).

Once the General Counsel has met his burden of proving that union activity was a motivating factor in Clary and Bonnette's job assignments, the burden shifts to Respondent Manno to prove that the alleged discriminatory conduct would have taken place even in the absence of the protected union activity. *Wright Line*, supra; approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). None of the explanations offered by the Respondent meets this burden.[15]

The Respondent relies on testimony by its own witnesses to dispute Bonnette's testimony that there was not enough work at Covington to warrant his (and, presumably, his successor Clary's) assignment there. Clearly, there was some punchlist work to be performed in completing the job at Covington. The availability of some work, however, does not explain why the Respondent chose only union activists to travel from Baton Rouge to perform it, or why, after Clary's departure, it no longer had any need for a mechanic at Covington.

The Respondent also claims that Jack Manno chose to transfer Clary from the Louisiana Express jobsite to the Covington jobsite, and then again to the New Orleans jobsite, because of leadman complaints about Clary's work. These alleged complaints, and the precipitate reassignments in response thereto, contrast suspiciously with Jack Manno's undisputed praise of Clary's working ability at the time of the unlawful layoffs. In any event, the Respondent does not contend, nor does the record show, that Jack Manno initiated his search for Bonnette's replacement by calling the Louisiana Express jobsite because Manno was aware of leadman Harper's discontent with Clary. In fact, there remains no legitimate explanation why the Respondent did not pursue its usual practice of attempting to hire someone from the local Covington area or why, with more than 30 mechanics at various jobsites in the Baton Rouge area, Manno decided to call the one jobsite where the only two employees qualified to replace Bonnette were the only two known union activists in the Baton Rouge area work force. Similarly, even assuming the validity of leadman Lane's alleged complaints about Clary's single day of work in Covington, there is no explanation why Jack Manno chose to offer Clary a ''last chance'' assignment in the New Orleans area, where Baton Rouge-based employees ''hardly even'' worked, when work was available at another Baton Rouge site.

Based on the foregoing, we find that the Respondent has failed to prove an affirmative defense that it would have assigned Bonnette and Clary to Covington and attempted to assign Clary to New Orleans even in the absence of their union activities. Consequently, we conclude that these job assignments violated Section 8(a)(3) and (1) of the Act.

The judge also summarily found that the General Counsel failed to prove allegations that the Respondent violated Section 8(a)(3) by constructively discharging Clary. Again, we disagree. As stated above, the attempted assignment of Clary to the New Orleans area jobsite was itself unlawful. Furthermore, Jack Manno falsely presented that assignment as Clary's only job alternative when there was work available in Baton Rouge and he knew Clary did not have the transportation to get to the job. In this context, and absent any legitimate explanation for the New Orleans assignment,[16] we find that the Respondent constructively discharged Clary in violation of Section 8(a)(3) and (1) of the Act.

It is undisputed that Bonnette had acted in concert with other employees in protected union organizing activities. His individual job action on October 1 was a continuation of these activities and a protest of what he reasonably (and correctly) perceived as the Respondent's unlawful discriminatory response to those activities. The Respondent contends that the Act does not protect Bonnette because no other employee joined him in his protest. Section 7 of the Act, however, ''defines both joining and assisting labor organizations—activities in which a single employee can engage—as concerted activities.'' *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984). Consistent with this definition, the Board holds that an employee acting alone to form, join, or assist a labor organization is nevertheless protected by Section 7 of the Act. *Cincinnati Suburban Press*, 289 NLRB 966 (1988). We therefore find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Bonnette for engaging in protected concerted union activities.

[14] We emphasize that the distance from Baton Rouge to Covington would not by itself warrant an inference of discriminatory intent. The significant point is that the Respondent did not regularly require Baton Rouge-based employees to travel that distance.

[15] One attempted explanation is totally irrelevant to the job assignment issue. The Respondent claims that Bonnette and Clary violated company rules by consuming alcoholic beverages and by smoking marijuana *prior to their layoffs*. It failed to prove that it would have laid them off for these transgressions in the absence of their union activities. In any event, the Respondent recalled both employees in spite of their alleged alcohol and drug use, and it does not contend that there is any evidence of such use after the recalls.

[16] We repeat our previous finding that the Respondent has failed to prove that, in the absence of Clary's union activities, it would have reassigned him to a New Orleans jobsite due to poor work performance at the Louisiana Express and Baldwin Motors jobsites.

AMENDED REMEDY

Having found that Respondent Manno Electric unlawfully assigned employees to remote jobsites and discharged them because of their union activities, we shall order it to cease and desist from such unfair labor practices and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent shall offer Bonnette and Clary immediate and full reinstatement to their former positions in the Baton Rouge area or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employee hired on or since the date of their discriminatory job assignments to fill the positions. The Respondent shall also make Bonnette and Clary whole for any loss of earnings suffered by reason of the discrimination against them.[17] Backpay shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, the Respondent shall remove from its files any reference to the unlawful discharges, and it shall notify Bonnette and Clary that this has been done and that the discharges will not be used against them in any way.[18]

Finally, the judge found that the General Counsel did not prove the allegation that the Respondent's discharge of Bonnette following his announcement that he was going on strike violated Section 8(a)(3) and (1) of the Act. The judge found that Bonnette's self-declared unfair labor practice strike was neither a strike nor protected concerted activity within the meaning of the Act. Regardless of whether Bonnette's attempted work stoppage was a strike within the meaning of the Act, the judge erred in finding that he was not engaged in protected activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. The Respondent, Manno Electric, Inc., Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to allow applicants to file applications for employment, refusing to hire applicants for employment, laying off employees, and discharging employees because of their membership in and/or affection for International Brotherhood of Electrical Workers, Local Union 995, AFL–CIO, or any other labor organization.

(b) Unlawfully advising employees that it would be futile for them to choose a union.

(c) Unlawfully continuing in effect an illegal no-solicitation rule.

(d) Unlawfully advising employees not to talk with union representatives or organizers on threat of discharge.

(e) Unlawfully interrogating employees in respect to their union affections.

(f) Unlawfully requiring employees to give written assurances that union organizing will not happen during the working day.

(g) Unlawfully instructing employees to report to the union activities of other employees and threatening legal action against employees who are reported for union activity.

(h) Unlawfully assigning employees to remote and isolated jobsites because of their union activities.

(i) Unlawfully discharging employees because of their union activities.

(j) Unlawfully discharging strikers and failing to reinstate them on their unconditional offer to return to work.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Joseph Rome, Chester R. Penny, Russell C. Bonnette, Patrick M. Clary, Edward Lee Grayson, and Calvin Jeffrey Lockhart full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Joseph Rome, Chester R. Penny, Russell C. Bonnette, Patrick M. Clary, Edward Lee Grayson, and Calvin Jeffrey Lockhart whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, offer Joseph Barthelot III, Thomas McGrew, Calvin Clary, Cloy Glynn Priest, Perry Guillory, Wesley Ford Stephens, and Wallace Roland Goetzman the jobs they would have filled had they been lawfully hired or, if those jobs no longer exist, to substantially equivalent positions.

[17] Backpay due to Bonnette shall include his transportation expenses to and from the Covington jobsite.

[18] We note that the language of the affirmative remedial provisions in the judge's recommended Order does not require modification to accommodate the remedy for the additional unfair labor practices which we have found.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Baton Rouge, Louisiana establishment copies of the attached notice marked ''Appendix A.''[34] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 21, 1992.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent, Manno Electric, Inc. and Jack L. Manno Sr., Baton Rouge, Louisiana, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prosecuting that part of the petition in the case of *Manno Electric, Inc. and Jack L. Manno v. International Brotherhood of Electrical Workers, Local 995, AFL–CIO, et al*., No. 394949 pending in the 19th Judicial District Court, Paris of Baton Rouge, State of Louisiana, Division D, composed of paragraphs 2, 5, 6, and 7.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and dismiss that part of the petition in the case of *Manno Electric, Inc. and Jack L. Manno v. International Brotherhood of Electrical Workers, Local 995, AFL–CIO*, No. 394919, pending in the 19th Judicial District Court, Parish of Baton Rouge, Louisiana, Division D, composed of paragraphs 2, 5, 6, and 7.

(b) Within 14 days after service by the Region, post at the premises of Manno Electric, Inc., in Baton Rouge, Louisiana, copies of the attached notice marked ''Appendix B.''[35] Copies of the notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondents' representatives, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where noticed to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 21, 1992.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the fourth amended complaint be dismissed insofar as it alleges violations of the Act other than those found in this decision; provided, however, jurisdiction of this action shall be retained in accordance with the remedy section of this decision.

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[35] See fn. 34, supra.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to allow applicants to file applications for employment, or refuse to hire applicants for employment, or lay off employees, or discharge employees because of their membership in and/or affection for International Brotherhood of Electrical Workers, Local Union 995, AFL–CIO, or any other labor organization.

WE WILL NOT unlawfully advise employees that it would be futile for them to choose a union.

WE WILL NOT continue in effect an illegal no-solicitation rule.

WE WILL NOT unlawfully advise our employees not to talk to union representatives or organizers on threat of discharge.

WE WILL NOT unlawfully interrogate employees with respect to their union affections.

WE WILL NOT require employees to give written assurances that union organizing will not happen during the working day.

WE WILL NOT unlawfully instruct our employees to report the union activities of other employees or threaten legal action against employees who are reported for union activity.

WE WILL NOT unlawfully assign employees to remote and isolated jobsites because of their union activities.

WE WILL NOT unlawfully discharge employees because of their union activities.

WE WILL NOT unlawfully discharge strikers or fail to return them to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Joseph Rome, Chester R. Penny, Russell C. Bonnette, Patrick M. Clary, Edward Lee Grayson, and Calvin Jeffrey Lockhart reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Joseph Rome, Chester R. Penny, Russell C. Bonnette, Patrick M. Clary, Edward Lee Grayson, and Calvin Jeffrey Lockhart whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Joseph Rome, Chester R. Penny, Russell C. Bonnette, Patrick M. Clary, Edward Lee Grayson, and Calvin Jeffrey Lockhart, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Joseph Barthelot III, Thomas McGrew, Calvin Clary, Cloy Glynn Priest, Perry Guillory, Wesley Ford Stephens, and Wallace Roland Goetzman the jobs they would have filled had they been lawfully hired or, if those jobs no longer exist, substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Joseph Barthelot III, Thomas McGrew, Calvin Clary, Cloy Glynn Priest, Perry Guillory, Wesley Ford Stephens, and Wallace Roland Goetzman whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

MANNO ELECTRIC, INC.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prosecute that part of the petition in the case of *Manno Electric, Inc. and Jack L. Manno v. International Brotherhood of Electrical Workers, Local 995, AFL–CIO*, No. 394919 pending in the 19th Judicial District Court, Parish of Baton Rouge, Louisiana, Divisions D, composed of paragraphs 2, 5, 6, and 7.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL withdraw and dismiss that part of our petition in the case of *Manno Electric, Inc. and Jack L. Manno v. International Brotherhood of Electrical Workers, Local 995, AFL–CIO*, No. 394949 pending in the 19th Judicial District Court, Parish of Baton Rouge, Louisiana, Division D, composed of paragraphs 2, 5, 6, and 7.

MANNO ELECTRIC, INC. AND JACK MANNO SR.

Kathleen McKinney, Esq., for the General Counsel.
Murphy J. Foster III, Esq., of Baton Rouge, Louisiana, for the Respondent.
Kendrick E. Russell, of Roseland, Louisiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LOWELL M. GOERLICH, Administrative Law Judge. The charge in Case 15–CA–11891 was filed by International Brotherhood of Electrical Workers, Local Union 995, AFL–CIO (the Union), on August 21, 1992, and a copy was

served on the Respondent, Manno Electric, Inc., on August 21, 1992. The charge in Case 15–CA–11891–2 was filed by the Union on September 18, 1992, and a copy was served by certified mail on the Respondent on September 18, 1992. The original charge in Case 15–CA–11922 was filed by the Union on October 5, 1992, and a copy was served by certified mail on the Respondent on October 5, 1992. The amended charge in Case 15–CA–11922 was filed by the Union on October 7, 1992, and a copy was served by certified mail on the Respondent on October 7, 1992. The original charge in Case 15–CA–11951–1 was filed by the Union on November 16, 1992, and a copy was served by certified mail on the Respondent on November 16, 1992. The amended charge in Case 15–CA–11951–1 was filed by the Union on January 22, 1993, and a copy was served by certified mail on the Respondent on January 22, 1993. The charge in Case 15–CA–1951–2 was filed by the Union on November 23, 1992, and a copy was served by certified mail on the Respondent on November 23, 1992. The charge in Case 15–CA–11997–1 was filed by the Union on January 8, 1993, and a copy was served by certified mail on the Respondent on January 8 and 19, 1993. The amended charge in Case 15–CA–11997–2 was filed by the Union on February 4, 1993, and a copy was served by certified mail on the Respondent on February 4, 1993. The original charge in Case 15–CA–12170 was filed by the Union on June 7, 1993, and a copy was served by certified mail on the Respondent on June 7, 1993. The first amended charge in Case 15–CA–12170 was filed by the Union on August 13, 1993, and a copy was served by certified mail on the Respondent and Jack L. Manno Sr., on August 16 and 20, 1993. The charge in Case 15–CA–12245 was filed by the Union on August 4, 1993, and a copy was served by certified mail on the Respondent on August 5, 1993.

A fifth order consolidating case, fourth amended consolidated complaint and notice of hearing was issued on September 13, 1993. In the fourth amended consolidated complaint it was alleged that Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act) had been violated.

The Respondents filed an answer denying that they had engaged in any of the violations alleged.

The fourth amended consolidated complaint, as amended,[1] came on for hearing in Baton Rouge, Louisiana, on September 27–30, October 1, and November 1–4, 1993. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witness, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

I. THE BUSINESS OF THE RESPONDENT

At all material times, Respondent, a corporation, with an office and place of business at Baton Rouge, Louisiana (facility) has been engaged in business as an electrical contractor.

During the 12-month period ending September 30, 1992, the Respondent, in conducting its operations described above, purchased and received at its Baton Rouge, Louisiana facility goods valued in excess of $50,000 from other enterprises located within the State of Louisiana, each of which other enterprises had received these goods directly from points outside the State of Louisiana.

During the 12-month period ending September 30, 1992, Respondent, in conducting its operations described above, provided services valued in excess of $50,000 for other enterprises within the State of Louisiana, each of which enterprises were directly engaged in interstate commerce.

At all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ASSOCIATION INVOLVED

At all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. FINDINGS OF FACT,[2] CONCLUSIONS OF LAW, AND REASONS THEREFOR

1. *First*: The material facts. The Respondent,[3] a family-owned business, is engaged, for the most part, in commercial electrical work.[4] Jack Manno Sr. (Manno) is the president who, along with his wife, owns all the stock in the Respondent Company. In respect to the operation of the Company, Manno testified, ''I'm everything.'' Manno's son-in-law, Dwayne Ebey, carries the title of general superintendent and Manno's son, Jack Manno Jr. (Jay Manno) carries the title of general manager and estimator. In its activities, the Respondent employs between 12 and 35 employees depending on the number of jobs it has going. A leadman is assigned to each job.[5] The Respondent operates nonunion[6] and pays less than union scale to its employees.

During the period when the events herein occurred, jobs with union contractors were difficult to find in the Baton Rouge area.[7] The union members, with the acquiescence of the Union, sought jobs with nonunion contractors. The Union hoped to organize the nonunion employers, for which reason it waived the requirement barring union members from working for nonunion employers. Members who were hired by

[1] Certain amendments were allowed at the hearing.

[2] The facts are based on the record as a whole and the observation of the witnesses. The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction of the findings, their testimonies have been discredited either as having been in conflict with the testimonies of credible witnesses or because the testimony was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in the light of the entire record. No testimony has been pretermitted.

[3] Respondent, as used herein, refers to the Manno Electric, Inc. If ''Respondents'' is used herein it refers to Manno Electric, Inc. and Jack L. Manno Sr.

[4] In addition to commercial electrical work, there is industrial electrical work. Earl Long, a journeyman electrician, testified that he had worked in both fields and found no ''problems'' working in either one of them.

[5] The alleged supervisory status of Ebey and Jay Manno will be discussed, infra.

[6] Nonunion employers herein refer to employers who do not have contractual relations with a union. Union employers herein refer to employers who do have contractual relations with a union.

[7] Only about 3 percent of the electrical work in the Baton Rouge area was performed by union contractors. In 1990, of the 690 union members, only 260 were referred to work in the Baton Rouge area.

nonunion employers were called ''Salts'' and the practice was called ''Salting.'' Pursuant to this policy, certain union members applied for work with the Respondent.

The Respondent was against the unionization of its business as appears from this notice dated September 2, 1992:

> These Union organizers do not know anything about our business—if it did, they wouldn't be trying to push themselves on us. The Union is not concerned about the future of Manno Electric nor the future of your jobs.
>
> Remember, what is good for Manno Electric is good for our employees. What is bad for Manno Electric is bad for our employees. You all know the history of Local 995 and its leadership. They have always been more concerned with receiving union dues and filling their treasury than with guaranteeing their members have steady work. What has the union done for you and your families or its members in recent years? They would rather you quit your good job and let your family go hungry than allow you to work non-Union. Ask how many people they have on their ''bench'' waiting for jobs like yours. What does that say about these people? It doesn't take a genius to know this Union is bad news!
>
> Let's continue to pull together and put an end to this Union mess before it gets started. While we can not command you or direct you not to sign those Union cards, we do suggest and advise that you do not, for the good of Manno Electric and for the good of all of our jobs.
>
> Again, we urge you not to sign those Union cards and we urge you not to get involved in Union meetings. If you are harassed, or in any way overly bothered by Union organizers or co-employees trying to get you to sign cards or go to meetings, please contact me at once so that we can see that the appropriate legal action can be taken to avoid this harassment. Also, if you have any questions about any of this, feel free to contact me directly to discuss this matter.

Second: Chester R. Penny, a journeyman and a member of the Union, appeared for work at the Respondent's facility on July 21, 1992. Penny's job application was given to Manno by his secretary. After Penny filled out the application, Manno reviewed the application in Penny's presence. Manno asked Penny if he belonged to the Union;[8] Penny answered ''Yes.'' Manno offered $10 an hour. Penny indicated acceptance. Penny was hired and told that ''his shop foreman'' would tell him where he was to go work. Penny's qualifications were not reviewed orally. Ebey called Penny and directed him to report to Bob Shavers for work at Acadia Trace Office Building. Penny started work on July 22, 1992. Penny was transferred to several other jobs, the last job being at Contempo Casuals on August 14, 1992. On the following Sunday, Ebey phoned Penny and advised him that he was laid off. He never was recalled. Ebey said that they were caught up in the work and that he would call Penny if they needed him. At the time of Penny's layoff, the Respondent had other work in progress.

[8] Manno had been a member of the Union at one time.

Starting August 6, 1992, Penny wore a union button every day. He solicited a new hire for the Union. Thereafter, the Respondent posted the following notice:

> NOTICE
>
> NO SOLICITATION
>
> Manno Electric strictly prohibits its employees from engaging in any form of solicitation during working hours. Anyone caught violating this rule will be terminated.
>
> ALCOHOLIC BEVERAGES
>
> Manno Electric strictly prohibits its employees from consuming alcoholic beverages of any type during work hours. This rule also prohibits workers from reporting to work after consuming alcoholic beverages. Any employee not reporting to work at a specific time due to the consumption of alcoholic beverages or consuming alcoholic beverages during working hours will be terminated.
>
> HARASSMENT OF FELLOW WORKERS
>
> Manno strictly prohibits its employers from harassing fellow workers either on or off the jobsite. Anyone caught violating this rule will be terminated.

On August 10, 1992, while Penny was working at the K-Mart stores, Ebey called the employees together and told them that Penny and Joseph P. Rome were union organizers and that the Union was trying to organize the Respondent's employees. Ebey also said ''that between the hours of 7:00 and 3:30 it was his time, that he didn't want us to talk to Joey Rome or myself during that period,'' if they did they would be ''fired.'' Lunchbreaks occurred between 12 and 12:30 p.m.

Third: Joseph P. Rome placed an application for employment with the Respondent on July 20, 1992. After Rome submitted his application he was interviewed by Manno. Manno asked Rome whether he had worked out of the Local, to which he responded, ''Yes.'' Manno inquired of Rome's experience. He answered that he had ''five years of mostly commercial experience.'' Manno offered $10 an hour and a job. Rome accepted. The next day Manno called Rome and told him to report to K-Mart and talk to Ronnie Miller. Rome went to work on July 22, 1992, and worked at K-Mart his entire employment period.

Ebey phoned Rome on Sunday, August 16, 1992, and told him that he was cutting back; that he could pick up his check on Monday and that he would be on the list for rehire. Rome's employment ended on August 14, 1992.

On August 6, 1992, Rome commenced wearing a union button. After August, Rome ''got one helper to sign a card'' and ''talked to people about organizing.''

On August 10, 1992, Rome attended the same meeting attended by Penny in which Ebey said that ''we were his from 7:00 to 3:30 and if we were caught organizing in that time we would be terminated.'' Ebey also stated that the K-Mart job was coming to a close at the end of the week. On several occasions, Rome contacted the Respondent to go to work. He

was never called back. Rome never received any negative comments about his work.

Fourth: Russell Christopher Bonnette, a journeyman electrician, placed his application with the Respondent on July 14, 1992. Manno interviewed him and, observing that he had ''good experience,'' hired him at $10 an hour. Manno told Bonnette to report to work at K-Mart to Ronnie Miller the next morning; however, Bonnette received a telephone call in the evening from Jay Manno directing him to report at the Respondent's office in the morning where he was told to go to Contemporary Fashions. He worked from July 15 to August 17, 1992. On Monday morning, Ebey notified Bonnette that ''he was cutting back'' and ''work was dwindling down.'' Bonnette responded, ''bullshit'' and indicated that he had been told that the Respondent needed 8 to 10 people at Circuit City. Ebey said he knew nothing about that. Bonnette was the leadman on the Contemporary Fashion job. Ebey complimented his work.

After August 6, 1992, Bonnette wore a union button and also talked to coworkers about joining the Union. He obtained one card signer.

On August 6, 1992, Jay Manno called Bonnette and asked him if he knew certain persons, all of whom were members of the Union. Bonnette asked why Jay Manno made the inquiry. He answered that he was going to hire two new men in a couple of days, that he was not going through the Union.

On August 17, 1992, Jay Manno, Bonnette, and Clary engaged in a discussion which was taped. Among other things, Manno said that he knew Penny and others were members of the Union; that when he wanted to organize he would let the Union know; that Bonnette and Clary were ''very good workers'' and their applications were in the active file; and that he had a ''ton'' of work ''but its filling up and finishing quick.'' Manno further said:

> You see, Chris, I am going to tell you something else I've had people this has never been a problem before because you guys are not the first 995 people to work around here and you won't be the last. Okay, as far as I am concerned, I don't know ya'll might not want work for me any more. I don't know, okay, but the thing about it is, I never had a problem whatever you want to call it of people organizing during or after either one. Now that this is surfaced, then I am going to have to have written assurance that it's not going to happen during the day. I think that would be nothing but fair because I am not paying anybody to do something else other than the activity they are to do and that's to work. Okay and that's it. Now as far as I am concerned, if you guys are agreeable with that then I don't [have] any problems with it. I really don't. I really don't because as far as I am concerned you are good workers that's all I am interested in.

Fifth: Edward Lee Grayson filed his job application with the Respondent on July 15, 1992. On July 16, 1992, Manno called Grayson and hired him at $8 an hour. Grayson had 6 years of experience. He was a journeyman. He went to work at Wal-Mart.

Grayson was laid off on August 17, 1992. Addressing Grayson and Bonnette, Ebey told them the Respondent was cutting back and was laying them off. He was called back to work on September 29, 1992, and assigned to the LA Express. Mike Clary, Ernie Harper, and Malcolm were on the job. In the morning before work, Grayson walked an informational picket line with Mike Clary, Earl Long, Johnny Mercer, and Business Manager Ricky Russell. Harper advised the Respondent of the event and Ebey appeared.

Grayson spoke to other employees about the Union.

Grayson and Calvin Jeffrey Lockhart decided to talk to Manno about wages which certain employees thought could be improved. Manno agreed to a meeting but would meet with only one employee at a time. Manno, addressing Grayson, said, ''I heard you were unhappy working for Manno Electric.'' Grayson replied that he was happy but was ''unhappy with the pay scale that we get.'' Manno asked for the names of others who were dissatisfied with the wages. Grayson refused to give the names.

On December 28, 1992, Grayson and Lockhart discussed their grievances against the Respondent. Out of the discussion came a resolution to go on ''an unfair labor practice strike'' for ''harassment and discrimination.'' After 4 o'clock, Grayson and Lockhart went to the Respondent's office to contact Manno. Manno was absent. They met with Jay Manno and told him they were ''tired of being harassed on their jobs.'' Lockhart told Jay Manno that ''somebody had broke into his vehicle, had taken his notes and had taken his name off the picket sign.'' He said that it had been Mark Creel, and he asked that Creel be fired: Jay Manno said he would handle it in his own way. The two employees responded that they were going on an unfair labor practice strike. Grayson said, ''I'm going on an unfair practice strike for harassment, also.''[9] Lockhart said he was going out on strike for ''harassment because they had went into his vehicle and took his notes and took part of his sign, and then threatened to physically harm him.''

The next day on December 29, 1992, Grayson and Lockhart walked the picket line. The employees walked the picket line on January 4, 1992. On January 5, 1992, Grayson received a notice to pick up a certified letter from the post office. Grayson picked the letter up on January 6, 1992. The envelopes revealed ''Notified 1/5/93.'' The letter, which was from the Respondent, stated that if Grayson did not reply by January 4, 1992, it would be believed that he did not want to work.[10]

On January 7, 1993, Lockhart and Grayson addressed the following letter to the Respondent:

> This letter is to re-affirm that Calvin J. Lockhart and Lee Grayson are still to on an unfair labor practices strike.

Thereafter, Lockhart and Grayson went to the Respondent's office and offered to unconditionally return to work. Manno said he would take them back to work and would have ''somebody or himself to call us that weekend and tell us where to report on Monday morning.'' Although Ebey called Grayson, Grayson was never given employment.

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[9] Lockhart corroborated this testimony.

[10] I find that the January 4, 1992 date in the letters addressed to Grayson and Lockhart were in the letters when received by Lockhart and Grayson. Lockhart had received a similar letter.

Seventh: Patrick Michael Clary was employed by the Respondent on July 10, 1992. His interview with Manno was on the telephone. His application revealed that he had worked for several union contractors. He was a journeyman electrician. Clary's application reflects that he had performed only industrial work. Clary's first job with the Respondent was at K-Mart. Thereafter he worked at Acadia Bank for about 2 weeks. Then Ebey sent Clary to Victoria's Secret for a day, after which Ebey assigned him to Home Depot for 2 days. Then Clary returned to Victoria's Secret and then went back to Home Depot. He returned to Victoria's Secret for 3 hours and then was sent to Contempo Casuals and then back to Victoria's Secret. At 3 a.m. until the next day, he worked on the Contempo Casuals job where he continued to work until he was laid off on August 15, 1992.

Clary was never returned to the Victoria's Secret job, although at the time of Clary's layoff, the Victoria's Secret job was starting to be worked again. The job manned up the week beginning August 17, 1992.

On August 17, Clary met with Bonnette, Manno, and Jay Manno. (See supra.)

Clary thereafter called Manno inquiring about employment.

On September 22, 1992, Clary received a letter which stated that the Respondent would take Clary and Bonnette back to work. Russell, Clary, and Bonnette went to see Manno. Manno talked to each separately. In Manno's office, Manno told Clary that he was going to put him back to work but he didn't have anything that particular day but ''that he would be in touch with me by phone.''

When Manno did not phone Clary, he called Manno. Manno told Clary to report for work on Tuesday morning to Ernie Schafers at Louisiana Express. Manno asked Clary if he had seen the notice on the bulletin board about drinking and solicitation. Clary answered, ''Yes.'' The Louisiana Express was 30 miles' distant. Grayson was on the job.

The next day Clary and Grayson walked an informational picket line before work. Johnny Mercer and Earl Long also walked. Harper informed the Respondent of the picketing incident. The next day on the job Clary started to bend some plastic PVC pipe by heating it on an exhaust pipe. Harper stopped him asserting that it would take too long to bend the pipe in that manner. That evening Manno called Clary and requested that he came to the shop in the morning and go to Covington. Later, Manno phoned Clary and told him he could ride in the company vehicle. Covington was 70 to 75 miles from Clary's home.

The next day Clary rode to Covington where he worked. There were no complaints about his work. In the afternoon, Manno called Clary and told him that the only place he had work for him was New Orleans. New Orleans is about 70–80 miles from Clary's home.

Clary met with Manno on October 1 or 2 and told him he would go to New Orleans if the Respondent furnished transportation. (Clary had told Manno that he did not have transportation.) Manno said that ''he couldn't do that.'' Clary replied, ''Well, then lay me off.'' Manno agreed. Clary waited for his check and was given a ''Voluntary Quit and refused suitable work.'' Clary had asked to go to Circuit City which was 10 miles from his home. He also explained to Manno that he ''needed to be in town to get my little boy off the bus.''

Manno had told Clary that Dwight Lane was not satisfied with his work and that Harper also had not been satisfied with his work, but still offered the job in New Orleans (Metairie).

Clary phoned Manno on January 6, 1992, and asked for work.

Eighth: Russell Christopher Bonnette received an unconditional offer of reinstatement by letter on September 28, 1992, as did Clary. They then went to the Employers' facility. Manno told Bonnette he would contact him. When they did not hear from Manno, they phoned him. Manno told Bonnette to report to Baldwin Motors in Covington and contact Dwight Lane, the leadman. Manno asked him if he had read the no-solicitation notice on the bulletin board. Bonnette said that he had read it.

The next day Bonnette appeared at Covington which was around 65 miles from his house. It was the first time he had been assigned a job at that distance. Bonnette performed some small jobs. Lane said to him, ''I really don't even know why they sent you here . . . I barely got enough work to keep these guys busy.'' Work was not available for Bonnette. Bonnette asked Lane to have Manno call him.

Bonnette reported at Covington the next morning. Bonnette had little work assigned to him. He asked Lane if he had told Manno to call him. Lane answered in the affirmative. Bonnette said, ''Could you ask him again to call me? . . . . This sending me to a job that's finished and letting me not ride with you . . . . I think they screwing with me . . . just because I'm a union guy?'' Lane delivered the message.

The next morning, Bonnette did not go to the job but went to Respondent's office where he spoke with Ebey. Bonnette said that he was being sent on a job where there was nothing to do. ''Why wouldn't they let me ride in the van back and forth.'' Ebey replied that there was work at Baldwin Motors, Bonnette told Ebey that he was going on an unfair labor practice strike. In parting Bonnette said, ''There is no work, Dwayne. That's bullshit. That and nothing but harassment.''

After this conversation, Bonnette went to the union hall. Bonnette tried to reach Manno by phone. Jay Manno asked to talk with him. Jay Manno asked Bonnette why he had not reported for work. Bonnette responded that he reported to the shop to talk to Ebey and ''I told him that I was going out on an unfair labor practice strike.'' Jay Manno replied, ''come get your check . . . you're fired . . . because you didn't report to work and went on strike.'' Bonnette's separation notice read: ''Employee failed to report to work at prescribed time.''

Bonnette had talked with no other employees about going on strike with him, although he did discuss the matter with Clary. Bonnette told Clary that ''He felt he was being discriminated against by putting him in a particular job. He felt that there was not a lot to do there, and there wasn't material on the job. He really thought that he was being set up.'' Bonnette asked Clary to join the strike. Clary declined observing that ''I didn't feel that I had a reason to go out on strike.''

Ninth: On August 6, 1992, job applicants Perry Guillory, Thomas J. McGrew,[11] Joseph P. Barthelot III, Jeffrey White,

[11] McGrew had also placed an application on July 28, 1992. McGrew had worked for Respondent before.

and Cloy Glynn Priest, together with Union Representative Ricky Russell, appeared at the Respondent's establishment. They were adorned with union insignia. The presence of these individuals were part of the Union's organization plan. All were permitted to place applications; all were union members, all were electrician journeymen.

Russell presented a letter to the Respondent naming Penny, Clary, Bonnette, Rome, and Grayson as the Union's in-house organizing committee.

White returned on August 24, 1992, and placed another application since the secretary said that an application was not on file. On September 16, 1992, White returned again and asked for work. Manno told him the Respondent was not hiring. None of the foregoing applicants were ever hired.

Tenth: Wesley Ford Stephens, a journeyman electrician and a union member, placed his application with the Respondent on August 17, 1992. At the same time, Wallace Roland Goetzman, a journeyman electrician and a union member, placed his application. They were told the Respondent was doing no hiring but would keep their applications on file. Each was wearing union insignia. On August 26, Stephens dropped by the Respondent's office and asked for work. None was available. Stephen also phoned the Respondent on September 4 and 16, 1992, and was told they were not hiring. Goetzman returned to the Respondent's office on September 2, 1992, to check his application. The Respondent was not hiring. Goetzman returned again on December 31, 1992. Five people showed up at the same time. Manno came out and asked them if they would cross a picket line. Some said they would; others said they would not; Goetzman said that he ''didn't know.'' Thereafter, Goetzman contacted the Respondent about once a month.

Eleventh: Calvin Jeffrey Lockhart also filed an application for employment on August 17, 1992. His application revealed nonunion employers. He had been a journeyman electrician for about 11 years. He had worked for the Respondent on several occasions. His application revealed industrial and commercial experience. Ebey called Lockhart on September 2, 1992. Ebey asked him if he were affiliated with a local union. Lockhart answered, ''No.'' Ebey continued, ''We're having some trouble with the union.'' He said he would get back with Lockhart later; that they had some work coming up. On September 2, 1990, Lockhart received a phone call from Ebey. Among other things, Ebey asked Lockhart if he was affiliated with the Union. Lockhart answered, ''No.'' Ebey then asked Lockhart if he could start work the next day. Lockhart answered in the affirmative. Lockhart was offered $10 an hour. Lockhart started work at Circuit City on September 2, 1992. At the time around eight employees were employed at Circuit City. It ''manned up'' to about 18 or 19 employees: Eight employees ''stayed there all the time.''

On Lockhart's first day of work on September 3, 1992, Ebey came to the job and asked Lockhart, ''You're not affiliated with the Union?'' Lockhart answered, ''No.''

Twelfth: Lockhart joined the Union on November 6, 1992, and thereafter wore a union button. He talked to five or six employees about wages. He noted that he was getting $10 an hour which was what he had received when he worked for Manno before. Along with Grayson, Lockhart visited Manno to talk about wages. Manno talked to Lockhart individually. Lockhart asked Manno for across-the-board raises for everybody. Manno became upset and asked Lockhart to leave the office. As Lockhart was leaving, Manno asked him for the names of people who thought they deserved a raise. Lockhart gave two names, Ernie and Mike. Lockhart decided not to give anymore names.

On December 23, 1992, Lockhart attended a company Christmas party. Everyone was given a turkey. ''I kind of became the brunt of the jokes.'' Lockhart heard Mark Creel remark, ''You think we ought to take him out back and whip his ass?'' When Lockhart went to his truck to leave, he found that his informational picket sign had been tampered with and his logbook was missing. ''The Manno Electric portion of the sign had been removed.''

On December 28, Lockhart walked an informational picket line. Upon Lockhart's request, Ernie informed the Respondent of Lockhart's truck break-in. Ebey appeared and handed Lockhart ''the crumbled portion of my informational picket sign.'' That same day, Lockhart and Grayson decided to go on an unfair labor practice strike. Lockhart received the same letter from the Respondent as did Grayson (see supra) requiring him to report for work on January 4, 1993. As noted above, Lockhart and Grayson terminated their strike and unconditionally offered to go back to work.

Thirteenth: On October 26, 1992, Earl Emery Long and Thomas Gibson, wearing union buttons, tried to file applications. They were told that the Respondent was not taking applications.

Jeffrey Louis Bourg appeared at the Respondent's office without any adornment of union insignia also on October 26, 1992. His application was taken. The secretary said the application would be placed in the file and that Bourg would be given a call ''if they came up with anything.''

Fourteenth: Long, Russell, Gibson, and John Thaddeus Charles appeared at the Respondent's facility on November 9, 1992. Russell tried to deliver a letter naming the union organizers. He also asked whether the Respondent was accepting applications. Manno said he would not accept the letter from the Union and that he was not hiring. Applications were not accepted.

Fifteenth: On November 26, 1992, Long went to the Respondent's office after Russell informed him that the Respondent would let him file an application; Long filed an application. Gibson was with Long. Each wore union buttons. Long was not interviewed or hired. Long checked his application again in December.

Sixteenth: On August 8, 1992, Ebey caught Clary, Bonnette, Grayson, and Jamie sharing a pitcher of beer at lunch. Ebey did not reprimand them but permitted them to work overtime that day. Thereafter, a notice was posted on the bulletin board:

ALCOHOLIC BEVERAGES

MANNO ELECTRIC STRICTLY PROHIBITS IT'S EMPLOYEES FROM CONSUMING ALCOHOLIC BEVERAGES OF ANY TYPE DURING WORK HOURS. THIS RULE ALSO PROHIBITS WORKERS FROM REPORTING TO WORK AFTER CONSUMING ALCOHOLIC BEVERAGES. ANY EMPLOYEE NOT REPORTING TO WORK AT A SPECIFIC TIME DUE TO THE CONSUMPTION OF ALCOHOLIC BEVERAGES OR CONSUMING ALCOHOLIC BEVERAGES DURING WORK HOURS WILL BE TERMINATED.

Conclusions and Reasons Therefor

A. *Supervisory Status of Dwayne Ebey*

I find that Dwayne Ebey was a supervisor within the meaning of the Act for the following reasons: He carried the title of general superintendent. He took care of electrical problems on the jobs. He assigned employees to the jobs and told the leadman what work was to be done on the job. He spent about 80 percent of his time viewing the work being done on the various jobs. He checked if there was any problem on the jobs and ''oversees'' the jobs. He reported personnel problems. He visited the various jobs almost every day. He gave ''feedback'' to Manno. He drove a company vehicle. He had an office. He received health insurance. He conferred with the leadman. Ebey was looked upon by the employees as a ''supervisor or foreman.'' Manno told an employee that Ebey was ''the foreman in charge.'' Ebey laid off employees. Employees believed Ebey could fire them. He warned employees about union organizing. He acted ''like he was the man who would call all the shots.'' He exercised independent judgment in overseeing the Respondent's jobs.[12]

I find Ebey is a supervisor within the meaning of the Act.

B. *The Supervisory Agency Status of Jay Manno*

Jay Manno was an officer of the Respondent and the son of Manno. He was listed as general manager. He discharged employee Bonnette for going on strike. He participated in the management of the Respondent when Manno was absent. He acted as agent of the Respondent. Jay Manno, in front of Manno, said to Bonnette and Clary, ''Final decisions come from me.'' I find Jay Manno was a supervisor within the meaning of the Act.[13]

C. *The 8(a)(1) Violations*

The General Counsel asserts that the Respondent violated Section 8(a)(1) of the Act by representing to employees that it would be futile for them to choose a union.

To support this assertion, the General Counsel cites the following evidence. Ebey told employee Bonnette that ''Manno Electric has never been union, it will never be union,'' and that Bonnette was wasting his time.

Ebey's statement was in violation of Section 8(a)(1) of the Act. See *Christopher Construction Co*., 288 NLRB 1272 (1988); *Ideal Elevator Corp*., 295 NLRB 397 (1989).

D. *The No-Solicitation Rule*

The General Counsel contends that the Respondent's no-solicitation rule violates Section 8(a)(1) of the Act.

The General Counsel cites the following evidence: On the next day after the employees began wearing union buttons and the Employer had received a letter naming the in-house union organizing committee, Jay Manno telephoned Bonnette on August 7, 1992, and told him that between 7 a.m. and 3:30 p.m., Bonnette's time belonged to the Respondent. Nothing was said about the lunch period. On the same date Grayson testified that Jay Manno said to him ''if you try to organize during business hours, I'm going to have to let you go. . . . If you try to organize between 7:00 and 3:30 I'll have to let you go.'' Nothing was said about lunchtime. In late August or early September, the Respondent posted a notice. ''Manno Electric strictly prohibits its employees from engaging in any form of solicitation during working hours. Anyone caught violating this rule will be terminated.''[14]

The credible evidence does not indicate that the Employer ever clarified its rule by advising employees that they were allowed to solicit during the lunch periods.

The Board holds that the use of the term ''working hours'' is prima facie susceptible to the interpretation that solicitation is prohibited during all business hours. The Board in *Ourway, Inc*., 238 NLRB 209, 214 (1978), states:

> We would therefore require the employer to show by extrinsic evidence that, in the context of a particular case, the ''working hours'' rule was communicated or applied in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work.

The Respondent has not sustained this burden. The Respondents maintenance of its no-solicitation rule and its threat to discharge employees for a violation of the rule were in violation of Section 8(a)(1) of the Act.

E. *The No-Talking Rule*

The General Counsel claims that the imposition of the no-talking rule was a violation of Section 8(a)(1) of the Act. The General Counsel cites the following facts.

On August 10, 1994, Ebey appeared at the K-Mart jobsite. Among other things, he pointed out Rome and Penny as union representatives. Ebey said that, although the employees had a right to organize, they were his from 7 a.m. to 3:30 p.m., and if they were caught organizing they would be fired. Ebey also said that the electricians were not to talk with Penny or Rome between the hours of 7 a.m. and 3:30 p.m. and that anyone caught talking to them would be fired.

Ebey's remarks to the employees were in violation of Section 8(a)(1) of the Act. See *Christopher Construction Co*., 288 NLRB 1272, 1274 (1988).

F. *The Unlawful Interrogation*

The General Counsel claims that the Respondent engaged in unlawful interrogation and cites the following evidence to support the claim. On August 17, 1994, Lockhart submitted a job application. Lockhart spoke with Ebey. Ebey asked Lockhart whether he was affiliated with the Union. Lockhart said that he was not. Ebey told Lockhart that he wanted to check because the Employer was having union trouble.

On September 2, 1994, Ebey called Lockhart. Ebey asked him if he was working. He also asked him if he were affili-

[12] In its brief the Respondent has not urged that Ebey is not a supervisor. In answers to the first three complaints, the Respondent admitted Ebey and Jay Manno were supervisors within the meaning of the Act.

[13] In its brief the Respondent has not urged that Jay Manno is not a supervisor.

[14] In view of the fact that ''lunch period'' was not included in the notice it is reasonable to conclude that it was not included in the statement of Jay Manno. I credit Bonnette and Grayson.

ated with the Union. Lockhart answered in the negative, and Ebey offered him a job.

On September 3, 1994, Lockhart's first workday, Ebey approached Lockhart on the jobsite and again asked him whether he was affiliated with the Union. Lockhart answered that he was not.

These interrogations placed to Lockhart (I credit Lockhart's testimony) during a union campaign which the Employer was opposing and which had a tendency to affect his job prospects had a tendency to restrain, coerce, and interfere with employees Section 7 rights. See *Rossmore House*, 269 NLRB 1176 (1984). The interrogations were in violation of Section 8(a)(1) of the Act.

G. *Informing Union Members That They Could Not Exercise Their Section 7 Rights in Future Employment*

The General Counsel asserts that the Respondent violated the Act by informing union members that the employment of union members in the future would be conditioned on written assurances that they would not engage in activities specifically protected and provided for under the Act.

The General Counsel points to this evidence to support his contention. During a recorded conversation of Manno with Clary and Bonnette, Manno said that he had hired union members in the past and that he was going to hire union members in the future ''but, the thing about it is, I never had a problem whatever you want to call if of people organizing during or after either one. Now that this is surfaced, then I am going to have written assurance that its not going to happen during the day. Not as far as I am concerned, if you guys are argreeable with that then I don't have any problems with it, I really don't. I really don't because as far as I am concerned you are good workers that's all I am interested in.''

Making such written assurances a condition of employment was an interference with employees Section 7 rights and in violation of Section 8(a)(1) of the Act.

H. *Surveillance and Threats*

The General Counsel contends that the Respondent should be found in violation of Section 8(a)(1) of the Act for asking employees to report union harassers and for threatening employees with legal action.

To support this proposition, the General Counsel cites the Respondent's letter of September 2, 1992: ''Again we urge you not to get involved in union meetings. If you are harassed, or in anyway overly bothered by Union organizers or co-employees trying to get you to sign cards or go to meetings, please contact me at once so that we can see that the appropriate legal action can be taken to avoid harassment.'' The General Counsel also points to Respondent's posted notice: ''Manno Electric strictly prohibits it's employees from harassing fellow employees either on or off the job site. Anyone caught violating this rule will be terminated.'' The communications were aimed at union organizing.

In *Hawkins-Hawkins Co*., 289 NLRB 1423 (1988), the Board found that an employer's statement interfered with, coerced, and restrained employees in the exercise of Section 7 rights where the employer told employees that ''if they felt 'harassed' by supporters of the Union they should inform management who would then 'take care of it.''' The Board opined:

> The Board has found similar statements unlawful because they have the potential dual effect of encouraging employees to identify union supporters based on the employees' subjective view of harassment and discouraging employees from engaging in protected activities.

In *Nashville Plastic Products*, 313 NLRB 462 (1993), the Board said:

> We agree with the judge that the Respondent violated Section 8(a)(1) by requesting employees who were ''bothered'' or ''harassed'' by other employees advocating the Union to report it to management. Such a request could be interpreted by employees to include lawful attempts by union supporters to persuade employees to sign union cards. It would thus tend to restrain proponents from attempting to persuade other employees for fear of being reported to management. See *Arcata Graphics*, 304 NLRB 541 (1991), and cases cited therein.

See also *Anja Engineering Corp*., 256 NLRB 1083, 1093 (1981).

Thus it seems well settled that the Respondent's communications set out above interfered with, coerced, and restrained employees in the exercise of their Section 7 rights and thereby the Respondent violated Section 8(a)(1) of the Act.

I. *Threats of Reprisal for Protected Concerted Activity*

The General Counsel maintains that the following letter contained language which caused the Respondent to have violated Section 8(a)(1) of the Act:

> Under most circumstances this [Lockhart's and Grayson's failure to report to work] would be cause for immediate dismissal, however, due to our circumstances you have until Monday, January 4, 1993 to report to work.
>
> Please contact me or Dewayne at 275–4334 for what job to report to. If you do not reply by January 4, 1993, I will assume you are no longer interested in working for Manno Electric.

The letter was directed to Lockhart and Grayson after they had informed the Respondent that they were going on an unfair labor practice strike.[15] The Respondent's threat to discharge Grayson and Lockhart for engaging in protected concerted activities was in violation of Section 8(a)(1) of the Act. See *Christopher Construction Co*., 288 NLRB 1272, 1276 (1988); *Gloversville Embossing Corp*., 297 NLRB 182 (1989).

The Respondent unlawfully conditioned the continued employment of Grayson and Lockhart on their abandonment of their right to engage in protected work stoppage.[16]

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[15] I find that Lockhart and Grayson engaged in protected concerted activity (see infra).

[16] Cf *National Management Consultants*, 313 NLRB 405 (1993).

J. *Refusal to Hire Union Members*

The General Counsel asserts that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to hire Guillory, Berthelot, Priest, Calvin Clary, McGrew, Stephens, and Goetzman.

The General Counsel relies on the following evidence: On August 6, 1992, Bertholet, Priest, McGrew, Calvin Clary, and Guillory submitted applications to the Respondent. All the applicants had extensive experience in the electrical field and were adorned with materials which identified them as union members. On August 7, 1992, the Respondent hired Tony Guilbeau and Jeff Acker. On August 10, 1992, the Respondent hired Andre Vinet and Tom Fletcher. On August 10, 1992, the Respondent hired Darryl Lalonde. On August 12, 1992, the Respondent hired Mike Harder. Guilbeau, Vinet, and Lalonde were hired at $10 per hour. None of the union member applicants were hired.

On August 12, Stephens and Goetzman applied for employment with the Employer. Stephens and Goetzman wore materials that identified them as union adherents. Despite significant electrical experience, neither Stephens nor Goetzman were hired. On September 9, the Employer hired Danny May who started at $10 per hour. On September 15, the Employer hired Benny Hartwick and Randy Townley who both started with the Employer making $10 per hour. On September 21, the Employer hired Royce Long who started with the Employer making $10 per hour. On October 1, the Employer hired Alvin Portier who was also paid $10 per hour by the Employer.

As noted above Bonnette, Rome, Penny, Clary, Grayson, and the Union commenced an open union campaign. Prior to the institution of the open union campaign, the Respondent hired the above-named five union members who the Respondent concedes it knew were union members. Two of these were used as leadpeople on two of the employer's jobs. Shortly after the Union openly commenced its organizational campaign, the Respondent hired six new employees and laid off the five union members it had hired for lack of work. None of the five applicants who showed a union preference were contacted about their experience or availability. Although the Respondent hired an additional seven employees, none of the employees who showed a union preference were ever contacted. All the applicants who showed a union preference had extensive experience.

Although it appears that early on the Respondent had no aversion to hiring union members, it appears that its attitude changed when it became apparent that those union members who had been hired were participating in a union organizational campaign. Thereafter, the Respondent clearly opposed the organization of its employees and hired no more union partisans.

In view of the Respondent's opposition to the Union's organizational campaign, its interrogation of applicants as to whether they were union members, and its failure to hire a single employee with union preference, the General Counsel has established a prima facie case of unlawful motivation. Thus, it became incumbent on the Respondent to present proof that the Respondent would not have hired the applicants showing union preference even had they been union members. See *Wright Line*, 251 NLRB 1083 (1980).

The Respondent claims that applicants other than the union partisans were hired because the other applicants had greater commercial electrical experience, they had worked for Manno or they were personally known by him. This claim might have been convincing had not the Respondent displayed no problem in hiring union members prior to the Union's open organizational campaign or applicants who had strong industrial experience and little commercial experience and were persons unacquainted with Manno. For example Clary's application reflects that he only worked for industrial contractors. His ending salary was $13 to $17 an hour. His jobs lasted 2 to 8 months. Moreover, if the Respondent had been earnestly seeking employees who had been its prior employment it would seem that it would have put back to work Clary and Bonnette (union members) who had occupied lead jobs.

The Respondent has not shown that it would not have hired the union partisan in the absence of their union affections. Its stated motives were false. ''[T]he Act is violated when an employer fails to consider an application for employment for reasons proscribed by the Act.'' *Shawnee Industries*, 140 NLRB 1451, 1453 (1963). See also *Phelps Dodge Corp. v. NLRB*, 313 US. 177, 185 (1941).

Moreover, the Respondent's discriminatory motivation is apparent from its failure to hire a single union partisan. Such anticipates a mathematical improbability. As was said in *Ventre Packing Co*., 163 NLRB 540, 541 (1967). ''While it is theoretically possible that the Respondent could have fortuitously selected for termination only those employees active in the Union, common sense and the laws of mathematical probability indicate that this was unlikely.'' See also *Webster Wood Industries*, 169 NLRB 67, 74 (1968).

By failing to hire Guillory, Berthelot, Priest, Calvin Clary, McGrew, Stephens, and Goetzman and by hiring only nonunion applicants, the Respondent violated Section 8(a)(1) and (3) of the Act. See *Fluor Daniel, Inc*., 304 NLRB 970, 971 (1991), in which the Board used language applicable here:

> We find it reasonable to infer that it was not just coincidental that all these applicants who displayed union affiliation were refused employment while those who were hired did not display union affiliation.

K. *The Layoffs of Rome, Penny, Bonnette, Clary, and Grayson*

The General Counsel maintains that the layoffs of Rome, Penny, Bonnette, Clary, and Grayson on or about August 17, 1992, were in violation of Section 8(a)(3) of the Act.

The General Counsel points to the following evidence: The Respondent told the five union member employees, above-named, that they were laid off because it was cutting back; however, the Respondent retained the six nonunion electricians that it hired the week before the layoff. There had been no criticism of the union employees' work performance.

At the time of the layoffs, Manno acknowledged the Respondent was performing work at Broadmoor Methodist Church, Victoria's Secret, Blue Ribbon, Acme, Joffrian, Baldwin Motors, Wiener, La Place, Circuit City, K-Mart, Louisiana Sheriff's, Louisiana Express, and Wallbangers. It was around the time the Circuit City job was starting to man up.

In view of Respondent's antiunion stance and the fact that the Respondent chose *all* of the union partisans for layoff, I find that the General Counsel has made a prima facie case.

The Respondent points out that it hired these five employees knowing that they were union partisans, thus, the Respondent may not be found to have discharged them because of their union affection. However, this assertion does not take into account the fact that the hiring took place before the Union declared an open union organizational campaign and that thereafter the Respondent displayed active opposition to the union organizational campaign and hired no more additional union partisans. The Respondent also points out that at the same time it laid off the five union partisans, it laid off several other nonunion employees. However, this does not account for the Respondent's retaining the employees that were hired a week before the layoff or why *all* the union partisans were chosen for layoff. There obviously were jobs which the union partisans could have performed. The Respondent has not truthfully explained why it, among all its employees, chose the only union partisans for layoff.[17] The Respondent has not sustained its burden under *Wright Line*, supra. The layoffs of Rome, Penny, Bonnette, Clary, and Grayson were discriminatory and in violation of Section 8(a)(3) and (1) of the Act.

L. *Bonnette's Remote Jobsite*

The General Counsel claims the Respondent violated Section 8(a)(3) and (1) by assigning Bonnette to a remote jobsite.

The General Counsel cites the following: After Clary and Bonnette returned to work in September 1992, Bonnette was sent to a jobsite at Covington, Louisiana, about 60 miles from Baton Rouge. Bonnette had never before been sent to a job so far away. Bonnette was not given permission to ride with the leadman in the Respondent's van, although other employees had been allowed to ride in the van. When Bonnette was placed on the job, an employee, Darryl Lalonde, was sent to the Respondent's Circuit City job.

In its brief the Respondent stated:

> In hopes of having the Board recommend dismissal of the charges or of having the union withdraw the charges, Manno Electric offered to recall Bonnette, Clary and Grayson when work became available for these three individuals about a month later in September of 1992.

Apparently pursuant to this purpose, the Respondent gave Bonnette the employment at Covington, Louisiana. Two other Manno employees were working at the Covington jobsite.

Although the Respondent could have assigned Bonnette to another jobsite, it does not appear that the General Counsel has established a prima facie case for discrimination, although there is an inference that by returning Bonnette to work, the Respondent was only giving lip service to its alleged attempt to remedy its alleged unfair labor practices.

[17] The Respondent followed no seniority system. The Respondent's selection of *all* the union partisans for layoff also anticipates another mathematical improbability.

M. *Bonnette's Discharge*

The General Counsel asserts that Bonnette was discharged by the Respondent after his return to work, in violation of Section 8(a)(3) and (1) of the Act.

Bonnette worked 2 days on the Baldwin Motors job in Covington, Louisiana. On the third day, Bonnette appeared at the Respondent's offices and notified the Respondent that he was going on strike. His stated reasons where that Manno had never offered to let him ride to the Covington job in the company van and that there was no work for him to do at the Covington job. Bonnette did not discuss the strike with other employees assigned to Covington. He did mention it to Clary whom he asked to go on strike. Clary refused to go on strike, stating that he had no reason. Bonnette's refusal to work was not authorized by the Union. Bonnette's refusal to return to work was not the result of concerted activity. He acted alone. For his action to have been protected under the Act, it must have involved more than a single person. *Denver Building Trades Council*, 82 NLRB 1195 (1949). *Meyers Industries*, 268 NLRB 493 (1984); 281 NLRB 882 (1986). Bonnette's dismissal was not in violation of the Act.

N. *Clary's Assignments*

The General Counsel contends that the Respondent violated Section 8(a)(3) and (1) of the Act by assigning Clary to Covington, Louisiana, and attempting to assign him to New Orleans, Louisiana.

Clary returned to work for the Employer on September 28, 1992. Three days after he was returned to work, Clary was assigned to the Covington job. He was allowed to ride in the Respondent's van. After the second day on the job, the only job the Respondent had for him was in New Orleans. Clary advised the Employer that he would need the Respondent to provide him with transportation because his car had been damaged in the hurricane and he was borrowing a vehicle. The Respondent would not provide a vehicle so Clary was unable to take the job. Clary asked for a layoff.

On October 1, the Respondent hired Alvin Portier who was assigned to work in the Baton Rouge area. On October 5, when Clary would have started work in New Orleans, a new employee started work in Baton Rouge.

The Respondent argues that Clary was an unsatisfactory worker and ''only because of the fact that Clary had a pending unfair labor practice charge, Jack Manno offered Clary one last chance at employment. Clary was offered the opportunity to work at the K-Mart project in Metairie, Louisiana.'' (Post Trial Memorandum by Respondent, p. 13).

The General Counsel has not established a prima facie case, although as in Bonnette's case there is an inference that the Respondent's putting Clary back to work was not sincere.

O. *Clary's Discharge*

The General Counsel contends that Clary was wrongfully discharged in violation of Section 8(a)(3) and (1) of the Act.

Clary was assigned a job in New Orleans. After Clary informed the Respondent that it would be impossible for him to accept the job because of lack of transportation, Clary was told there was no other job available. Clary asked for a layoff, to which the Respondent agreed. However, when Clary received his pink slip, it indicated that he had quit voluntarily refusing other suitable work. The General Counsel in-

sists that the Respondent's assigning Clary a job he could not accept was a constructive discharge. ''A constructive discharge claim must satisfy two requirements. The employer's conduct must create working conditions so intolerable that an employee is forced to resign and the employer must have acted with the intent to discourage membership or activity.'' *NLRB v. Bestaway Trucking*, 22 F.3d 177 (7th Cir. 1994).

The General Counsel has not established a prima facie case for constructive discharge.

P. *Refusal to Give Earl Long, Tom Gibson, and John Charles Job Applications*

The General Counsel claims that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to give Earl Long, Tom Gibson, and John Charles job applications. The General Counsel supports this claim with the following evidence.

On October 26, 1992, Long and Gibson went to the Respondent's offices to submit job applications. They were wearing union buttons. They were told that the Respondent was not accepting applications. Jeffrey Bourg, another union member, went to the Respondent' offices. He was not wearing union insignia; he was given an application and allowed to apply for employment.

On November 9, 1992, Long, Gibson, and Charles went to the Respondent's office to apply for employment. All of them were wearing union buttons which identified them as members of the Union's organizing committee. None was allowed to complete an application for employment.

A Respondent witness testified that no one had been denied the right to fill out an application which appears inconsistent with the Respondent's position expressed in its brief ''because the company was not taking applications at the time that Mr. Long and Mr. Gibson applied, the company concedes that it is possible that they were not allowed to complete an employment application at that time.'' (R. Br., p. 35).

The Respondent's failure to allow applicants who were wearing union insignia to fill out job applications while allowing an applicant who was not wearing union insignia to fill out an application was discriminatory and in violation of Section 8(a)(3) and (1) of the Act.

Q. *The Discharges of Lockhart and Grayson*

The General Counsel maintains that the discharge of strikers Lockhart and Grayson and the failure to reinstate them constitute a violation of Section 8(a)(3) and (1) of the Act.

As noted above, Lockhart and Grayson on December 28, 1992, having grievances against the Respondent, went on an ''unfair labor practice strike.'' On December 29, 1992, they walked a picket line. Thereafter, the employees received a letter stating that if they did not report back for work by January 4, 1992, it would be assumed that they were not interested in working. On January 7, 1992, they addressed a letter to the Respondent stating that they were ''still out on an unfair labor practice strike.'' Thereafter, Lockhart and Grayson went to the Respondent's offices and unconditionally offered to return to work. Although Manno said that he would take them back to work, they were never returned to work. The Respondent considered them as ''quits.''

The Respondent asserts that the ''strike'' of Lockhart and Grayson was not protected concerted activity. Section 7 of the Act provides: ''Employees shall have the right . . . to engage in other concerted activities for the purpose of . . . other mutual aid or protection.'' Under *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), concerted activity of a similar nature as that of Grayson and Lockhart was found to be protected under Section 7. As in the *Washington Aluminum* case, supra, the activities of Grayson and Lockhart did not fall within the ambit of unprotected activities, such as violence or breach of contract. Moreover, they did not need the union's approval (there was neither a collective-bargaining agent nor a contract) to authenticate their action.[18] Additionally, as stated in the *Washington Aluminum Co.* case, ''it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not.'' Id. at 16.

I find that the ''strike''[19] of Grayson and Lockhart was a labor dispute (see Sec. 2(9) of the Act) and a concerted[20] activity protected under Section 7 of the Act.

The General Counsel maintains that the letters addressed to Grayson and Lockhart were in violation of Section 8(a)(1) of the Act and converted the strike if it were not already an unfair labor practice strike into an unfair labor practice strike. The letter advised:

> Under most circumstances this would be cause for immediate dismissal, however, due to our circumstances you have till Monday, January 4, 1993 to report to work.
>
> Please contact me or Dewayne at 275–4334 for what job to report to. If you do not reply by January 4, 1993, I will assume you are no longer interested in working for Manno Electric.

By this letter the Respondent clearly conditioned the strikers' continued employment on their abandonment of the right to engage in protected concerted activities and was tantamount to a discharge. See *Christopher Construction Co.*, supra. Moreover, the letters were received too late for the recipients to be required to reply by the deadline.

In its answer to the fourth amended consolidated complaint, the Respondent alleged ''Ed Grayson and Calvin Lockhart voluntarily quit their employment at Manno Electric.'' Thus, the Respondent considered that the employees were off the Respondent's payroll. The sanction of the letter was obviously invoked. By Respondent's letter, the strike was continued as an unfair labor practice. Cf. *Gloversville Embossing Corp.*, 297 NLRB 182.

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[18] ''A walk out of unorganized employees is protected by the Act.'' *Charge Card Assn. v. NLRB*, 653 F.2d 272, 275 (6th Cir. 1981).

[19] It is stated in 29 U.S.C. § 142 (2):

> The term ''strike'' includes any strike or concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slowdown or other concerted interruptions of operations by employees.'' (Emphasis added.)

[20] See *Meyers Industries*, 268 NLRB 493 (1984), 281 NLRB 882 (1986).

On an unconditional offer to return to work, the Respondent was obligated to return Grayson and Lockhart to work which it failed to do.[21]

The discharges of Grayson and Lockhart[22] and the Respondent's failure to return them to work was in violation of Section 8(a)(1) of the Act.

Case 15–CA–12170

Motion to Dismiss

The Respondent in its memorandum states: ''Jack Manno was named personally a respondent in these proceedings. . . . Respondents submit that the Board has no jurisdiction over Jack Manno personally for any purpose at all.'' This issue was raised in Respondent's Motion to Dismiss. Manno had been made a party along with Manno Electric, Inc. in Case 15–CA–12170 which concerned the filing of an alleged unlawful lawsuit in the state court jointly by Manno and Manno Electric (see infra). The General Counsel opposes the Motion to Dismiss citing *Las Villas Produce*, 279 NLRB 883 (1986), which held an individual liable as an alter ego. It is clear in the instant case that Manno and Manno Electric acted in concert and jointly brought the state court suit. They were acting together and for each other. Manno, by joining with Manno Electric, acted with and for Manno Electric. Each participated in the alleged unfair labor practices, the filing of the state lawsuit. They jointly pray as follows:

> WHEREFORE, plaintiffs, Manno Electric, Inc. and Jack L. Manno pray that defendants be duly cited and served with a copy of this Petition and that after due proceedings had there be judgment rendered herein in favor of Manno Electric, Inc. and Jack L. Manno and against the International Brotherhood of Electrical Workers, Local Union 995, K.E. Russell, Patrick M. Clary, William H. Duke, Eric Paul Kidder, William Johnson, Earl E. Long, Steve Pritchard, Wallace Roland Goetzman, Jr., Edward L. Grayson, John Charles, Thomas Gibson, Sr., Eddie Bourque, Damon W. Gibson, Joseph Rome, Calving Jeff Lockhart, Ronald W. Palmer, James L. Lanoux, Wesley Stephens, Greg M. Laverne and Cliff Zylkes, for an amount evident in these premises plus all costs of these proceedings.

If Manno were permitted to bring the state lawsuit, without prejudice, he would be obtaining for Manno Electric indirectly what Manno Electric could not obtain directly, the pressing of an alleged illegal state lawsuit against the Union for which Manno Electric would benefit. Nothing in the Act gives ''the Company's principal that privilege.''[23] The Motion to Dismiss is denied.[24]

The State Court Suit

On May 28, 1993, the Respondents Manno Electric and Jack L. Manno filed a petition against the Union, K. E. Russell, assistant business agent for the Union, and 19 other persons alleged to be members of the Union in the 19th Judicial District Court, Parish of Baton Rouge, State of Louisiana, Number 394919, Division D. The Respondents prayed for a judgment against the defendants ''for an amount evident in these premises plus all costs of these proceedings.'' Respondents' request for judgment was based on the following alleged wrongdoings.

Paragraph 2 of the petition:

> Defendants have cooperatively conspired in an effort to injure plantiffs' business, to restrain plaintiffs' trade, to slander both plaintiffs and to personally injure plaintiff, Jack Manno. Defendants Russell, Clary, Duke, Kidder, Johnson, Long, Pritchard, Goetzman, Grayson, Charles, T. Gibson, Bourque, D. Gibson, Rome, Lockhart, Palmer, Lanoux, Stephens, Lavergne, and Zylks have *all made statements* at the encouragement of the leadership of Local 995 *to the National Labor Relations Board* and others alleging unlawful acts on behalf of Manno Electric and Jack Manno with specific malicious intent of injuring plaintiffs' business. Such statements were made in bad faith, were untrue and have been subsequently acknowledged as untrue by the defendants, or have been found untrue by the agency in question. Despite such acknowledgment, the statements made by these individual defendants have damaged and continue to damage the business of Manno Electric and have personally injured and caused emotional distress to plaintiff, Jack Manno. [Emphasis added.]

Paragraph 3 of the petition:

> Defendant Clary has, upon information and belief at the encouragement, coordination, and cooperation with other defendants, including Local 995 and its assistant business agent, defendant Russell, *submitted affidavits and statements to the Texas Department of Labor* which falsely accused Manno Electric of violating the law. Such statements were made with malice and in bad faith. While such statements were made in an attempt to recover unemployment compensation, upon information and belief, these claims have been denied. [Emphasis added.]

Paragraph 4 of the petition:

> Defendant Grayson has, upon information and belief at the encouragement, coordination, and cooperation with other defendants, including Local 995 and its as-

[21] ''The Respondent had a continuing obligation to accept striking employees' unconditional offers to return to work and to reinstate those employees if positions were available, or if positions were not available, to place the strikers on a prefential hiring list.'' *Bartlett Nuclear*, 314 NLRB 1 (1994).

[22] The law is clear that when an employer disciplines an employee because he has engaged in an economic strike, such discipline violates Section 8(a)(3) of the Act.'' *General Telephone Co.*, 251 NLRB 737, 738, 739 (1980).

[23] Phrase used in the Respondent's Memorandum in referring to Manno (p. 1).

[24] Cf. *General Motors Products Co.*, 164 NLRB 64 (1967), in which citizens of a community who joined with an employer were found guilty of unfair labor practices.

sistant business agent defendant Russell, *submitted affidavits and statements to the Louisiana Department of Labor* which falsely accused Manno Electric of violating the law. Such statements were made with malice and in bad faith. While such statements were made in an attempt to recover unemployment compensation, upon information and belief, these claims have been denied. [Emphasis added.]

Paragraph 5 of the petition:

> Upon information and belief, Local 995 participates in a ''job targeting program'' with certain union contractors offering to pay a portion of the wages of certain employees of employer competitors of Manno Electric with the intent of benefiting Local Union 995, its signatory employers, and its members and with the intent of injuring and restraining the trade of Manno Electric. The libelous statements, harassment and intentional infliction of emotional distress committed by Local 995 and its named defendant members were, in part, motivated by the attempt of Local 995 to injure the business of Manno Electric to the benefit of the union business of the of Manno Electric and to benefit the union members of Local 995.

Paragraph 6 of the petition:

> Upon information and belief Local 955 and its assistant business agent, defendant Russell, have encouraged its membership to make *false statements* and to misrepresent the truth in bad faith and in a malicious manner to the *National Labor Relations Board* and to state agencies with the intention of injuring the business of Manno Electric to the benefit of certain union electrical contractor competitors of Manno Electric and to the benefit of all defendants. [Emphasis added.]

Paragraph 7 of the petition:

> The individual defendants, at the suggestion and policy of Local 995 and its business manager, defendant Russell, have maliciously and in bad faith undertaken an effort to harass and intimidate Jack Manno and other employees of Manno Electric *by repeatedly calling the offices of Manno Electric and invading, en masse, the offices of Manno Electric to ''allegedly check on applications and available work*.'' The true intent and purpose of such actions of the defendants made at the suggestion and policy of Local 995 and defendant Russell has been for the specific purpose of harassing and intimidating Jack Manno and other employees Manno Electric. [Emphasis added.]

Paragraph 8 of the petition:

> The harassment by the defendants of Jack Manno has been of a repeated, pervasive and outrageous nature and made with the specific intent of causing injury and emotional distress to Jack Manno and other employees of Manno Electric.

Paragraph 9 of the petition:

> The actions of the named defendants, through their intentional *infliction of emotional distress, libel, slander and unfair trade practices* outlined above, *have caused injuries* to Manno Electric and to Jack Manno by injuring the reputation of Manno Electric in the business community and have directly resulted in damaging the business reputation and profitability of Manno Electric. Such actions have injured Jack Manno personally by causing untold mental anguish and emotional distress. [Emphasis added.]

The defendant answered among other things that parts of the petition were arguably preempted and protected by the Act and protected by state law.

Depositions of Russell, Goetzman, and Clary were taken by the Respondents. The first complaint filed by the General Counsel in the instant case was filed on October 30, 1992. Additional complaints were filed thereafter. This case was tried on the fourth amended complaint dated September 13. 1993.

The General Counsel asserts that the state court suit was filed in violation of Section 8(a)(1) and (4) of the Act.

In regard to the affidavits referred to in the state petition, J. Manno testified that he had read none of them prior to the filing of the petition, that the only information he had learned in respect to them ''might'' have come from his attorney. ''I probably was told what they said and it was a lie.'' However, Manno did testify that he had read the affidavit which Grayson had given to the state unemployment Board and in it Grayson had lied about ''his reasons for being discharged.'' Other lies were that he wasn't put ''on a job where he could talk to nobody''; that the Respondent had not worked for him; that he feared for his safety; and that J. Manno was ''the big bad wolf that was going to gobble him up, and that simply was not true''; that he wasn't able to talk to anybody; and that Grayson was being ''harassed'' and wasn't given any work.

J. Manno testified that the reason he filed the state court suit:

> I feel that I have been abused. I think I have been abused physically, mentally, and financially above and beyond anything that I can ever expect or ever had happen to me in the past. I think it was done maliciously, and I think that I want to be compensated for these losses, and my family compensated for the hurt that they have endured over the past 15 months.

He also testified that his brush with the Union had impaired his health and he had lost business because contractors did not want to deal with one who was experiencing labor problems. J. Manno also testified that he ''illegally'' lost certain jobs which were targeted by the Union. On these jobs he would have ''made money.''

Russell testified that the charges were filed in this case because ''he felt like that the employees had been discriminated against by the company.'' Russell asserted that the charges were not filed to harass, get even, or put the Respondent out of business and without intent to harm the Respondent. Russell testified that the Respondents' lawsuit ''has frightened. It has caused my organizing to slow down tremendously. It made a lot of my members afraid to try to go out: afraid that they are going to get sued.'' Organizing

at the Respondent's business has ceased because Russell is ''afraid of the law suit.''

In *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983), the Supreme Court opined that:

> To summarize, we hold that the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law. Retaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease-and-desist order against a state suit. The Board's reasonable basis inquiry must be structured in a manner that will preserve the state plaintiff's right to have a state-court jury or judge resolve genuine material factual or state-law legal disputes pertaining to the lawsuit. Therefore, if the Board is called upon to determine whether a suit is unlawful prior to the time that the state court renders final judgment, and if the state plaintiff can show that such genuine material factual or legal issues exist, the Board must await the results of the state-court adjudication with respect to the merits of the state suit. If the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief. In short, then, although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis.

In the case of *Loehmann's Plaza*, 305 NLRB 663, 669 (1991), the Board stated:

> In *Bill Johnson's*, the Supreme Court considered whether the Board could enjoin the prosecution of a state court civil suit. *The Court concluded that for a lawsuit to be an enjoinable unfair labor practice it must both lack a reasonable basis and have been filed with the intent of retaliating against an employee for the exercise* of Section 7 rights. However, in reaching its determination in *Bill Johnson's*, the Court at footnote 5, stated that it was not addressing the legality of all lawsuits:
>
> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit . . . that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. . . . Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act . . . and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction ''where [the Board's] federal power pre-empts the field.'' *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). [Emphasis added.]

In *Bill Johnson's*, supra at 748, the Supreme Court instructed the administrative law judge:

> It was not the ALJ's province to make such factual determinations.[25] What he should have determined is not whether the statements in the leaflet were true, but rather whether there was a genuine issue as to whether they were knowingly false. Similarly, he should not have decided the facts regarding the business interference counts; rather, he should have limited his inquiry to the question whether petitioner's evidence raised factual issues that were genuine and material.

Under the teachings of *Bill Johnson's*, supra, the first consideration must be whether the Respondent suit is a suit ''claimed to be beyond the jurisdiction of the state courts because of federal-law preemption or a suit that has an objective which is illegal under the federal law.''[26]

In *Loehmann's Plaza*, supra, the Board opined ''the states must yield to the Board's primary jurisdiction over conduct clearly protected or prohibited by Section 7 or 8 of the Act.''

A state lawsuit has an ''illegal objective'' coming within the exception to *Bill Johnson's*, supra if it is aimed at achieving a result incompatible with the objectives of the Act. Cf. *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832 (1991).[27]

(A) The allegations of wrongdoing set forth in paragraph 2 of the Plaintiff's petition (see supra) are inextricably connected and a material part of the allegations therein claiming that the defendants made untrue statements ''to the National Labor Relations Board'' in bad faith. Indeed, if such allegation were not proved, the Plaintiff's cause of action would fail, for on this cord the Plaintiff's whole claim of injury hangs. Thus, it is clear that the Plaintiff's claim is derived from and based on the defendants' protected right to furnish information to the Board. The defendants were protected by Section 7 of the Act in submitting affidavits to the Board. See *Dahl Fish Co.*, 279 NLRB 1084, 1110, 1111 (1986). Moreover, additionally, the Plaintiff, by filing and pursuing its suit, engaged in conduct which had the tendency to dissuade employees from seeking access to the Board and its processes.

The Supreme Court has said in *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967):

> Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board.

See also *NLRB v. AA Electric Co.*, 405 U.S. 117 (1972).[28]

The obvious effect of paragraph 2 was to both punish the defendants and to frighten employees from appealing to the Board. Plaintiff's state court suit was a prohibited act aimed at discouraging employees' protected activities and was incompatible with the objectives of the Act and had for its purpose an illegal objective. By filing and continuing the state

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[25] The administrative law judge determined that the petitioner's suit lacked merit based on his own evaluation of the evidence.

[26] See also *Teamsters Local 952 (Pepsi Cola Bottling)*, 305 NLRB 268 (1991).

[27] ''If it [a state lawsuit] is unlawful under traditional NLRA principles, it can be condemned as an unfair labor practice.''

[28] ''Employees, whether right or wrong, have the right to invoke the processes of the Board.'' *NLRB v. Auto Workers Local 212*, 690 F.2d 82, 85 (6th Cir. 1982).

court lawsuit as to paragraph 2, the Plaintiff interfered with, restrained, and coerced employees in exercise of rights guaranteed by Section 7 of the Act and were in violation of Section 8(a)(1) of the Act. The state court suit comes under the exception of *Bill Johnson's*, supra. It was preempted by Federal law.[29]

(B) In paragraph 5 the Plaintiff complains that a ''job targeting program'' was utilized by the Defendant's with the intent of injuring and restraining the trade of Manno Electric and benefiting the Union, its signatory employers, and its members. Whether the Plaintiff may pursue a state lawsuit based on such a claim depends on whether the ''job targeting program'' is protected by the Act.

The ''job targeting program'' is a practice utilized by the Union to make possible competitive bidding for jobs by union contractors against nonunion contractors. It works this way. The Union supplements the wages of the employees of certain union employers so that they may bid on a parity with nonunion contractors whose payscale is lower. By this method the Union is able to maintain the union wage scale on the job and obtain work for its members. Obviously, it also benefits the union contractor.

Section 7 provides that employees shall have the right ''to engage in other concerted activities for the purpose of . . . other mutual aid or protection.'' The objectives of the ''job targeting program'' are to protect employees' jobs and wage scales. These objectives are protected by Section 7. Thus, the plaintiff's suit, which interferes with, restrains, and coerces employees in their Section 7 rights, offends Section 8(a)(1) of the Act. The claims which the Plaintiff sought to press were preempted.

(C) Paragraph 6 is aimed at the Union's right to encourage its membership to submit affidavits to the Board. This is also a protected right under Section 7 of the Act. The Plaintiff's suit in this regard violates Section 8(a)(1) of the Act. It was preempted by Federal law. (See supra.)

(D) The conduct complained of in paragraph 7 of the petition (repeatedly calling at company office to check applications en masse), likewise falls within the protection or proscription of the Act and is preempted.[30] To make such conduct the subject of a state lawsuit is a violation of Section 8(a)(1) of the Act. As long as the applicants behaved in a lawful manner they were free to check on their job applications while wearing union insignia of which the Respondents' apparently complains. The adjudication of their conduct in this regard is with the Board.

By instituting and pressing the lawsuit above described for a recovery grounded on matters preempted by the Act, the Respondents violated Section 8(a)(1) of the Act. Moreover, the state court action had a discouraging effect upon employees seeking the Board's processes or giving information to the Board.[31]

(E) It does not appear that paragraphs 3 and 4 come under the *Bill Johnson's* exception. Thus, the question is whether these paragraphs lack a reasonable basis and were filed with the intent of retaliating against employees for the exercise of Section 7 rights.

These paragraphs contain claims that the employees involved submitted affidavits and statements to the Texas Department of Labor which falsely accused Manno Electric of violating the law and were made with malice or bad faith. This type of conduct does not appear to be protected by the Act nor illegal under the Federal law. The administrative law judge is admonished by the Supreme Court to confine adjudication to whether there was ''a genuine issue'' and ''whether petitioners evidence raised factual issues and were genuine and material.'' Hence, it is not within my jurisdiction to ascertain the Louisiana law on the subject or to determine the credibility or other issues involved in the allegation. Thus, as stated by the Supreme Court, ''The Board must await the results of the state court adjudication with respect to the merits of the state suit.''

The State Court Deposition

The Respondents deposed several defendants named in the state lawsuit. The Respondents, by deposing these defendants, violated Section 8(a)(1) and (4) of the Act. See *Bill Johnson's Restaurants*, 249 NLRB 155, 165–168 (1980).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to exercise jurisdiction herein.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed by Section 7 of the Act, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By laying off Joseph Rome, Chester R. Penny, Russell C. Bonnette, Patrick M. Clary, and Edward Lee Grayson on about August 17, 1992, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By failing and refusing to hire Joseph Barthelot III, Thomas McGraw, Calvin Clary, Glynn Priest, Perry Guillory, Wesley Ford Stephens, and Wallace Roland Goetzman Sr., the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

6. By discharging Calvin Jeffrey Lockhart and Edward Lee Grayson, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

7. By refusing to allow Earl Emery Long Jr., Thomas Gibson, and John Thaddeus Charles to apply for employment because of their union affection, the Respondent engaged in unfair labor practices within the meaning of 8(a)(1) and (3) of the Act.

8. The Respondents, by filing a petition in the 19th Judicial District Court, Parish of Baton Rouge, State of Louisiana

[29] ''When an activity is arguably subject to § 7 or § 8 of the Act, the States . . . must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.'' *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

[30] I have found that the Respondent violated the Act in refusing to give job applications to union partisans.

[31] ''[T]he avenue to the Board's processes must be kept completely free from any coercion or reprisals from employers or labor organizations.'' *Buffalo Newspaper Guild Local 26 (Buffalo Courier Express)*, 266 NLRB 813 (1983).

No. 394919, Division D, for ''an amount evident in the premises'' grounded in matters preempted by the Act, and with an illegal objective, have violated Section 8(a)(1) and (4) of the Act.

9. By deposing the defendants in the Louisiana state court action, the Respondents violated Section 8(a)(1) and (4) of the Act.

10. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, Respondent Manno Electric, having unlawfully laid off Joseph Rome, Chester R. Penny, Russell C. Bonnette, Patrick M. Clary, and Edward Lee Grayson, and unlawfully discharged Calvin Jeffrey Lockhart and Edward Lee Grayson, it is recommended that Respondent Manno Electric remedy such unlawful conduct.

In accordance with Board policy, it is recommended that Respondent Manno Electric offer the above-named persons immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, dismissing, if necessary, any employee hired on or since the date of their layoffs and/or discharges to fill the positions, and make them whole for any loss of earnings they may have suffered by reason of Respondent Manno Electric's unlawful acts herein detailed, by payment to them of a sum of money equal to the amount they would have earned from the date of their unlawful layoffs to the date of valid offers of reinstatement, less their net interim earnings during such periods, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having also unlawfully refused and failed to employ Joseph Barthelot III, Thomas McGraw, Calvin Clary, Cloy Glynn Priest, Perry Guillory, Wesley Ford Stephens, and Wallace Roland Goetzman, it is recommended that the Respondent Manno Electric remedy such conduct. It is recommended that Respondent Manno Electric offer the above persons employment to the same positions at which they would have been employed had they been hired or, if such positions no longer exist, to substantially equivalent positions without prejudice to the seniority of other rights and privileges they may have acquired, dismissing, if necessary, any employees employed since the dates of refusals to hire and make them whole for loss of earnings they may have suffered as a result of the discrimination against them by payment of them of a sum of money equal to the amount they would have earned from the date they would have been respectively employed by the Respondent, Manno Electric, had it not discriminated against them to the date of an offer of employment, less net earnings during the period to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co*., supra, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.

It is further recommended that the Respondents, Manno Electric and Manno, cease and desist from prosecuting that part of the state court petition composed of paragraphs 2, 5, 6, and 7 and that the Respondents be required to withdraw and dismiss that part of the petition. It is further recommended that the defendants be allowed no attorney fees for defense of the state court lawsuit at this time; however, it is recommended that jurisdiction be retained for the purpose of assessing such attorney fees or further action in event the Respondents do not prevail on the remainder of the state court action.[32]

[Recommended Order omitted from publication.]

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[32] See *Buffalo Newspaper Guild Local 26*, supra.